Senator Feinstein Seeks Overturn of Federal Regulations that May Preempt California's Landmark Privacy Law

September 28, 2004

Washington, DC – U.S. Senator Dianne Feinstein (D-Calif.) today urged the U.S. Comptroller of the Currency to revoke or revise federal regulations that could prevent the State of California from enforcing its toughest-in-the-nation privacy law, SB 1.

Senator Feinstein also announced today that she has cosponsored two Senate resolutions, sponsored by Senators John Edwards (D-NC), Barbara Boxer (D-Calif.), and Richard Durbin (D-IL), that would ensure that these regulations would have "no force or effect."

California's privacy law sets a strong standard for how Californian's personal information is used. Under the law, companies must generally get consumer permission (opt-in) before they share personal information with outside companies. It also allows consumers to have a say in whether their personal information can be shared with affiliated companies (opt-out).

Despite the fact that California's law was upheld by in Federal District Court earlier this year, the Comptroller of the Currency has put in place regulations, which may invalidate some of the core protections of California's law by asserting that federally-chartered banks may make loans or take deposits "without regard to state law limitations" concerning access to credit reports and disclosure of consumer information.

The text of Senator Feinstein's letter to the Comptroller of the Currency follows:

The Honorable John D. Hawke, Jr.
Comptroller of the Currency
Office of the Comptroller
250 E Street, SW
Washington, DC 20219

Dear Comptroller Hawke:

I am greatly concerned that regulations your office recently issued will erode protections that California grants to customers of financial institutions. In particular, one California law now in jeopardy protects the personal financial information of California residents. I am writing to you ask whether I am interpreting your regulations correctly. If I am, I strongly encourage you to revoke or revise the regulations in the interests of protecting California's consumers.

California has literally hundreds of pages of banking laws. These laws cover the full spectrum of regulation, from licensing and registration to rules for taking deposits and making

loans to prohibiting certain banking practices. The Office of the Comptroller of the Currency's new regulations greatly muddy the waters with regard to how effective California's laws will be. Both the California Department of Financial Institutions and the California Attorney General wrote to you last October to ask you not to implement your new regulations.

One California law contains some of the strictest rules in the country to protect the privacy of consumers' financial data. These protections are found in the California Financial Information Privacy Act of 2003 (commonly known as "California Senate Bill 1," or "SB 1"). The heart of the bill states that "Except as provided . . . , a financial institution shall not sell, share, transfer, or otherwise disclose nonpublic personal information to or with any nonaffiliated third parties without the explicit prior consent of the consumer to whom the nonpublic personal information relates" (California Financial Code, Section 4052.5).

This law took a substantial amount of work to pass. The California legislature enacted it only in 2003, after years of effort. And earlier this year, a federal district court upheld the law against challenges that it violated the Fair Credit Reporting Act. Thanks to that case, the law finally went into effect for the first time on July 1.

However, I now fear that regulations your office issued threaten SB 1 and other California consumer protection laws. On January 13, your office issued regulations posted in the *Federal Register* at 69 F.R. 1895 and at 69 F.R. 1904. Both of these regulations are troublesome.

Whether or not it was your intent, the regulations at 69 F.R. 1904 seem to invalidate core protections of California S.B. 1.

- **Regarding credit reports, 12 C.F.R. 7.4008 (d)(2) now states, "A national bank may make non-real estate loans without regard to state law limitations concerning: . . . (vii) Access to, and use of, credit reports." Similar language appears at 12 C.F.R. 34.4(a)(8)**

- **Regarding disclosure of personal private financial data, 12 C.F.R. 7.4007(b)(2) now states: "A national bank may exercise its deposit-taking powers without regard to state law limitations concerning . . . (iii) Disclosure requirements." Similar language appears at 12 C.F.R. 7.4008(d)(2)(viii), and at 12 C.F.R. 34.4(a)(9).**

California Financial Code Section 4052 clearly regulates the privacy of credit reports and the disclosure of personal financial information. As a result, your new regulations may put those vital protections at risk.

I further note that the regulations issued at 69 F.R. 1895 disturb me. If I read them correctly, they prohibit California's non-judicial regulators from enforcing many of its own consumer banking laws against federally-chartered banks, and would instead give that power to the Federal government. That is, California cannot enforce its own banking laws.

I would like to request that you please consider my discussion above, and advise me whether I am correct in concluding that:

(A) The regulations contained at 69 F.R. 1904 will preempt the protections that SB 1 offers to California consumers who use national banks; and

(B) The regulations contained at 69 F.R. 1895 would strip from California the right to enforce S.B. 1 and other California laws that protect state residents from the practices of national banks.

I would further ask you to please provide me with a comprehensive list of:

(A) Every California state law that the regulations at 69 F.R. 1904 will preempt in whole or in part;

(B) Every California state law that California will no longer be able to enforce by itself, in whole or in part, in accordance with 69 F.R. 1895;

(C) Every federally-chartered bank that now operates in California.

In addition, I am especially concerned about your new regulations because they cover only federally-chartered banks. California's laws will continue to apply to state-chartered banks. This situation will create a confusing obstacle-course for consumers. They will not know what protections they have unless they first investigate the legal technicalities of banking charters. Your agency has written in the *Federal Register* that you support uniform banking laws to make it easier for banks to operate in different states. I put to you that this convenience for banking companies comes at the expense of banking consumers.

I cannot emphasize how concerned I am that your new regulations may very well wreak havoc with the privacy laws that California has established for its residents, and with the state's banking laws more generally.

Thank you for your prompt attention to these requests."

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